NO. 82-352

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner

versus

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAURICE R. FRANKS
444 Keeler Parkway
Pueblo, Colorado 81001
Telephone (303) 948–4100

Counsel of Record for Petitioner

A member of the Bar of this Court
in association with

ALAN L. SULZENFUSS
Post Office Box 1003
Salida, Colorado 81201
Telephone (303) 539–3106

Of the Colorado Bar

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented by the instant petition:

1. Does a general enabling statute such as Colorado Revised Statutes §41–4–101 grant a municipal corporation exemption from the federal antitrust laws?

2. Does the opinion of the Tenth Circuit in the instant case, 679 F.2d 805, create a conflict between the circuits in light of the opinion of the First Circuit in *Cory v. Look*, 641 F.2d 32?

3. Does the opinion of the Tenth Circuit in the instant case fly directly in the face of the holding of the Supreme Court in *Community Communications Co. v. City of Boulder*, 102 S.Ct. 835?

4. Is summary judgment an appropriate remedy in an antitrust suit where substantial questions remain for the trier of facts?

LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the proceeding in this Court and in the court whose judgment is sought to be reviewed are:

1. Pueblo Aircraft Service, Inc., petitioner herein, appellant in the Court of Appeals, and plaintiff in the district court. Pueblo Aircraft Service, Inc., is a family business incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

2. The City of Pueblo, Colorado, a respondent herein, appellee in the Court of Appeals, and defendant in the district court. The City of Pueblo is a municipal corporation incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

3. Pan-Ark Aviation, Inc., a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Pan-Ark Aviation, Inc., is a close business incorporated in Colorado, having no parent companies, subsidiaries or affiliates.

4. George Rabatin, Jr., a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Mr. Rabatin is an officer of Pan-Ark Aviation, Inc., *supra.*

5. Thomas Lopez, a respondent herein, appellee in the Court of Appeals, and defendant in the district court. Mr. Lopez is a former director of aviation for the City of Pueblo.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Pueblo Aircraft Service, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals, reported at 679 F.2d 805 (1982), appears as Appendix A hereto. The opinion of the district court reported at 498 F.Supp. 1205 (D. Colo. 1980), appears as Appendix C hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered on 13 April 1982. A timely petition for Rehearing and Suggestion for Rehearing *en banc* was denied on 28 May 1982, and this petition is filed within 90 days of such denial. The denial of rehearing appears as Appendix B hereto. A copy of the Judgment and the Opinion, constituting the mandate, was transmitted to the United States District Court for the District of Colorado on 7 June 1982.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves Colorado Revised Statutes §41–4–101, which provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the

> purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

Colorado Revised Statutes §41–4–101 is set out in Appendix D.

This case also involves the Sherman Act and the Clayton Act, 15 U.S. Code §§1, 14.

15 U.S. Code §1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S. Code § 1.

15 U.S. Code §14 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether

patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act, 15 U.S. Code §14.

The Sherman Act and the Clayton Act, 15 U.S. Code §§1, 14, are set out in Appendix E.

STATEMENT OF THE CASE

The City of Pueblo, Colorado, is a home rule city. It owns and operates Pueblo Memorial Airport. The airport is located east of the City and is outside the corporate limits of the city.

Plaintiff, a Colorado corporation owned and operated by Willard J. Teel, and his wife, Betty I. Teel, operated a business on airport land leased from Pueblo between 1970 and June, 1977. Plaintiff's business consisted, among other things, of refueling aircraft, repairing and maintaining aircraft, and giving student flight instruction. A person who engages in such activities at an airport is referred to as a fixed

based operator, or "FBO." A fixed base operation is like a gas station for airplanes. In 1976, and during most of the time discussed, there were three fixed base operators at Pueblo Memorial Airport: Plaintiff; Flower Aviation; and Pan-Ark Aviation. The lease under which plaintiff operated required to purchase from the City of Pueblo all aviation fuel that it sold. Similar provisions were contained in the leases of the other fixed base operators, with the result that all competing FBOs at Pueblo Memorial Airport sold the same brand of gasoline.

Pueblo Aircraft Service's lease was to expire in March 1977. In December 1976, the city sent Pueblo Aircraft Service a letter advising that its leasehold would be put up for bid, but that the essential terms of the lease *would remain the same.* The city then put the leasehold up for bid with a requirement that the successful bidder *construct a new hangar.* The bid specifications also provided that if the successful bidder were an existing fixed base operator on the airport (translate "Pan-Ark"), the rent on such operator's pre-existing leasehold would be increased according to the terms of the bid. The requirement in the bid specifications that a new hangar be constructed, and the specific provisions in case the successful bidder were the holder of another lease on the airport, were significant departures from the city's letter representing that the essential terms of the new lease would remain the same.

Only two parties submitted bids for plaintiff's leasehold: plaintiff, and Pan-Ark Aviation, Inc. The City of Pueblo accepted the bid of Pan-Ark Aviation. Having lost their lease at the airport, plaintiff's business was destroyed and plaintiff was eliminated as a competitor at the airport in the areas of refueling aircraft, repair and maintenance of aircraft, and student flight instruction.

During discovery, it was learned that some time in late

1976 or early 1977 (shortly after the date on which the city sent Pueblo Aircraft Service the letter representing that there would be no major changes in lease terms), representatives of the city and Pan-Ark met and discussed Pan-Ark's desire to construct a new hangar, and Pan-Ark's desire to have more space on which to operate at the airport. Plaintiff's leasehold was adjacent to Pan-Ark's then-existing leasehold.

Thereupon, the terms of the new lease were formally announced, with specific provisions requiring the construction of the new hangar and specific terms allowing a bidder who is the holder of an adjoining leasehold on the airport (translate "Pan-Ark") to include an increase in rent on its pre-existing leasehold in its bid. Plaintiff feels this provision virtually ensured that the high bidder would be the holder of the adjoining leasehold.

The effect of this provision was to eliminate plaintiff as competitor at Pueblo Memorial Airport, and to grant Pan-Ark a virtual monopoly in major aircraft repair and student flight instruction at the airport.

Plaintiff filed suit in the United States District Court for the District of Colorado alleging antitrust violations. Jurisdiction was founded on 15 U.S. Code §15 and 28 U.S Code §1337. Plaintiff alleged that the lease clause which required it to purchase from the city of Pueblo all fuel for resale violated the Sherman Act, 15 U.S. Code §1, and the Clayton Act, 15 U. S. Code §14. Plaintiff alleged that the defendants had conspired to rig the bidding so that the defendant Pan-Ark Aviation, Inc. would have a decisive competitive edge and would be able to eliminate plaintiff as a competitor at Pueblo Memorial Airport in violation of the Sherman Act, 15 U. S. Code §1. Plaintiff further alleged that the simple act of leasing the land on which plaintiff had operated to its competitor and thus reducing the number

of competitors at the airport was an unreasonable restraint of trade in violation of the Sherman Act, 15 U.S. Code §1. Other claims for relief against other defendants were disposed of by stipulation or by the trial court and are not the subject of appeal.

The trial court ruled that since Pueblo was a Colorado home rule city, it was exempt or immune from the application of the antitrust laws under the decision of the Tenth Circuit Court of Appeals in *Community Communications Company v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980). It ruled that plaintiff had produced insufficient facts in light of its conclusion to defeat motions for summary judgment. Plaintiff appealed the summary judgment to the Tenth Circuit Court of Appeals and while the appeal was pending this Court decided *Community Communications Company v. City of Boulder*, 102 S. Ct. 835 (1982), ruling that home rule cities do not automatically enjoy exemption from federal antitrust laws.

The Court of Appeals ruled that, in spite of this Court's decision in *Community Communications v. City of Boulder*, Pueblo was still exempt from federal antitrust laws and affirmed the district court. As to the other defendants, the Court of Appeals ruled that summary judgment was proper on the merits.

ARGUMENT-REASONS FOR GRANTING THE WRIT

1. The Decision of the Tenth Circuit Court of Appeals In This Case Is In Direct Conflict With This Court's Ruling In *Community Communications, Inc. v. City Of Boulder.*

In *Community Communications, Inc. v. City of Boulder*, 102 S. Ct. 835 (1982), this Court in reversing the Tenth Circuit ruled that a municipality is exempt from the appli-

cation of federal antitrust laws only insofar as it is acting in accordance with a "clearly articulated and affirmatively expressed" state policy to "displace competition with regulation on monopoly public service." The Tenth Circuit had ruled that home rule cities within Colorado were exempt from the application of federal antitrust laws because the acts of a home rule city were equivalent to the acts of the State of Colorado. But this Court ruled that we are a nation of states, not of "city states." The simple fact that the state itself had expressed no opinion other than to delegate the matter to home rule cities did not constitute state action.

Yet right on the heels of the decision in *Community Communications, Inc.*, the Tenth Circuit now has ruled again that a general enabling statute such as C. R. S. 1973 §41–4–401 constitutes sufficient authority from the state to grant municipalities exemption from the federal antitrust laws. This statute makes no mention of monopoly public service or restricting competition. It sets forth no "clearly articulated" state economic policy. It simply authorizes municipalities to acquire land and to operate airports. Clearly this statute does not meet the requirements of *Community Communications Co., Inc., supra.*

But the opinion of the Tenth Circuit goes further. Reading the latter half of the opinion, the Tenth Circuit says that whenever a municipality is acting in a governmental (as opposed to a proprietary) capacity, the municipality is acting for the public at large and consequently is expressing state power and enjoys exemption from federal antitrust laws. This totally ignores this Court's rulings, not only in *Community Communications Co., Inc. v. Boulder, supra,* but also in *City of LaFayette v. Louisiana Power and Light Company*, 435 U. S. 389 (1978), and *California Liquor Dealers v. Metcal Aluminum*, 445 U. S. 97 (1980).

It is curious indeed that in reaching its rather startling conclusion, the Tenth Circuit chose to rely heavily on *Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966). The First Circuit itself recognized that that case no longer had vitality in light of this Court's recent decisions referred to above. *Cory v. Look*, 641 F.2d 32, 37 note 7 (1981).

Whether the opinion of the Tenth Circuit is taken in the narrower sense that an enabling statute such as Colorado Revised Statutes §41–4–401 grants that a municipality exemption from federal antitrust laws, or in the broader sense that any time a municipality acts in a governmental capacity it enjoys exemption from federal antitrust laws, the opinion clearly contradicts the ruling of this Court. On these grounds alone certiorari is proper under Rule 17.1 (c) of this Court.

2. The Decision Of The Tenth Circuit Court Of Appeals In This Case Is In Direct Conflict With The Decision Of The First Circuit Court Of Appeals In *Cory v. Look*.

As noted above, the Tenth Circuit now has ruled that a statute which merely authorizes municipalities to acquire and operate airports grants exemption from the federal antitrust laws to those municipalities for anticompetitive activities at airports. This directly contradicts the ruling of the First Circuit in *Cory v. Look, supra*. In that case the question involved alleged anticompetitive activity by the Woodshole, Martha's Vineyard and Nantucket Steamship Authority of Massachusetts (the Authority). Not unlike the case at bar, the Authority was charged with participating with other defendants in attempting to monopolize. The Authority was attempting to monopolize parking facilities by driving other parking lot owners out of business. The Authority argued that it had legislative authority to own and operate parking lots, citing a Massachusetts statute.

The First Circuit agreed that the Authority had power from the state legislature to own and operate parking lots. But the First Circuit said: ". . . this simply empowers the authority to behave as an ordinary economic agent; we see no necessary anticompetitive implication." 641 F.2d at 37. The court looked for some "clearly articulated and affirmatively expressed" state policy to displace competition, but found none, saying ". . . thus the authority cannot establish that there is a "clearly articulated and affirmatively expressed" sovereign state policy favoring the Authority's boycott of competitors in the parking market. . . ." 641 F.2d at 37. The First Circuit ruled that the Authority was not exempt from the application of federal antitrust laws and reinstated the complaint.

The Tenth Circuit and the First Circuit looked at similar statutes, but they came up with entirely different results. The First Circuit found no exemption. The Tenth Circuit found a broad, and possibly unlimited, exemption. Since there is a split in the circuits, it is appropriate for this Court to grant certiorari to the Tenth Circuit.

3. This Case Is Important To The Nation Because The Ruling Of The Tenth Circuit Grants Exemption From Antitrust Laws To All Municipal Corporations So Long As Those Corporations Act Within Their Granted Powers.

In *City of LaFayette v. Louisiana Light and Power, supra,* this Court expressed the concern over the economic effect of permitting local governments to pursue their own economic policies. After noting that there were 62, 437 different units of local government in this country according to a 1973 report of the Census Bureau, the plurality opinion stated:

> . . . If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy congress established. 345 U. S. at 408.

According to the Census Bureau, there are 266 incorporated cities and towns within Colorado. 1/ Under the ruling of the Tenth Circuit all of these are free to operate municipal airports in any manner they choose without regard to the anti-competitive effects. At municipal airports they are free to ignore federal antitrust laws. In the states under the immediate jurisdiction of the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) there are 1,867 incorporated cities and towns. 2/ Under the ruling of the Tenth Circuit all of the cities and towns are free to operate airports and impact interstate commerce without regard to the antitrust laws. Considering the importance of aviation in this country, both commercial and general, the Tenth Circuit has created a considerable chink in the "armor of antitrust protection" which the congress has established and this Court has upheld and protected. But the reasoning of the Tenth Circuit, and its holding, are not limited to airports. States generally grant municipalities broad authority to engage in various economic enterprises for the benefit of their citizens. Colorado, for example, specifically authorizes municipalities to acquire gas and electric power distribution systems (C. R. S. 1973 §31-15-

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1/ Preliminary report 1980 Census of Population and Housing, Colorado U. S. Department of Commerce, Bureau of the Census.

2/ *Ibid.*, for those respective states.

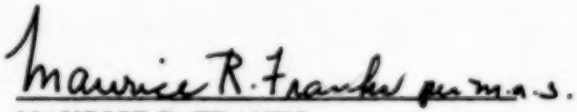
707) and to establish markets, slaughter houses, cold storage plants, public scales, and parking facilities (C. R. S. 1973 §31–15–711). Of course there are many other examples. It was such a general enabling statute under which the City of LaFayette, Louisiana operated its electric utility. Louisiana Revised Statutes 33:361. This honorable Court ruled that that statute on its face did not exempt the City of LaFayette from the federal antitrust laws. But under the ruling of the Tenth Circuit this is exactly the type of statute which would grant exemption.

If the decision of the Tenth Circuit is read in its narrow sense, a municipality would have to find some specific state authorization before it could claim exemption from the antitrust laws. But if the several district courts read the decision in its broad sense, then anytime any municipality within the Tenth Circuit operates in a governmental capacity it enjoys exemption from the antitrust laws. This is indeed a "considerable chink" in the armor of antitrust protection.

One hesitates to predict what the other circuits will do, faced with the split between the Tenth Circuit and the First Circuit. But if they follow the Tenth Circuit, and municipalities would exercise all the pressure on them they could to persuade them to do so, then the federal antitrust laws would, for practical purposes, cease to apply to municipalities in spite of the policies of the Congress and this honorable Court. To protect the national economic policy established by the Congress and promoted by this Court, this Court should grant certiorari to correct the obvious errors of the Tenth Circuit.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue herein to the United States Court of Appeals to the United States Tenth Circuit, and that the judgment and order of that court be reversed and the instant case be remanded for trial.



MAURICE R. FRANKS
444 Keeler Parkway
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